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No. 91-929

# In the Supreme Court of the United States

OCTOBER TERM, 1991

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SANTE KIMES, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether petitioner is entitled to relief under 28 U.S.C. 2255 on the ground that the district court's instructions concerning the law of involuntary servitude were contrary to this Court's decision in *United States* v. *Kozminski*, 487 U.S. 931 (1988).

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 939 F.2d 776. The opinion of the district court (Pet. App. 7a-15a) is unreported. The opinion of the court of appeals on direct review is unreported, but the judgment is noted at 831 F.2d 1066 (Table).

### JURISDICTION

The judgment of the court of appeals was entered on July 24, 1991. A petition for rehearing was denied on September 12, 1991. Pet. App. 16a. The petition for a writ of certiorari was filed on December 9, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. After a jury trial in the United States District Court for the District of Nevada, petitioner was convicted on five counts of holding domestic workers in involuntary servitude, in violation of 18 U.S.C. 1584; one count of conspiring to hold domestic workers in involuntary servitude, in violation of 18 U.S.C. 371; seven counts of transporting illegal aliens, in violation of 18 U.S.C. 1324(a)(2); and one count of escaping from lawful federal custody, in violation of 18 U.S.C. 751(a). In May 1986, petitioner was sentenced to concurrent five-year terms of imprisonment on each of the 14 counts.

2. The evidence at trial established that petitioner, with the knowledge and assistance of her husband, enticed a number of illegal aliens to work for her as maids. She either transported young, poorly educated, Spanish-speaking girls from Mexico or recruited such girls who had recently arrived in the United States. The girls worked at petitioner's residences in Las Vegas and Honolulu, both of which were totally fenced in. Petitioner's other employees were instructed not to let the girls answer the door, receive or send mail, use the telephone, or leave the premises unaccompanied. Although the girls were promised a salary and time off, petitioner forced them to work long hours, seven days a week, without pay. Petitioner threatened to have the girls deported or jailed if they failed to obey her orders. She also physically abused the girls. Gov't C.A. Br. 8-15.

At trial, petitioner did not object to the court's instructions to the jury on the involuntary servitude count. On appeal, she likewise failed to raise the instructional issue. The court of appeals affirmed in an unpublished opinion. 831 F.2d 1066 (Table).

3. Following the decision of this Court in *United States* v. *Kozminski*, 487 U.S. 931 (1988), petitioner filed a motion to vacate her sentences on the involuntary servitude and conspiracy counts, under 28 U.S.C. 2255. She argued that the jury instructions at her trial were contrary to the standards set out in *Kozminski*. In that case, this Court held that for purposes of criminal prosecutions under 18 U.S.C. 1584, "the term 'involuntary servitude' necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process." 487 U.S. at 952. The Court rejected the argument that mere psychological coercion is sufficient to establish involuntary servitude. See *id.* at 936.

4. The district court denied the Section 2255 motion, holding that "the jury in this case was instructed in a manner not inconsistent with *Kozminski*." Pet. App. 12a. The instructions provided:

> In considering whether a defendant held certain persons in a condition of compulsory service, that is, whether the service was involuntary, you may consider the evidence of force, threats, intimidation or other means of compulsion. You may consider whether the defendant used means of compulsion sufficient in kind and degree to subjugate the will of an ordinary person having the same general station in life and background and experience as that of the alleged victims and to cause the alleged victims to believe that they had no reasonable means of

> escape and no choice except to remain in the service of [petitioner and her husband].[1]

*Id.* at 10a-11a. The district court concluded that "[t]he jury instructions discuss the evidence against the defendant in terms that could, in light of the evidence against the defendant, only have been construed by the jurors to mean the kind of physical or legal coercion defined by *Kozminski*." *Id.* at 12a. The court noted that the jury had acquitted petitioner on the two counts of involuntary servitude where the evidence did not show that petitioner had actually beaten the girl in question. On the five counts on which the jury convicted petitioner, in contrast, there was evidence of "both physical and legal coercion." *Ibid.* For example, the court explained, the evidence relating to Delores Salgado showed that petitioner "slapped * * * and deliberately burned her"; the evidence relating to Adela Guzman showed that petitioner "beat [her] with a wire and wooden coathangers and a belt buckle and repeatedly slapped her"; the evidence relating to Amalia Osorio showed that petitioner "pushed and struck" her; the evidence relating to Mirabel Cruz showed that petitioner "burned [her] with a hot iron"; and the evidence relating to Maria Vasquez showed that petitioner "physically restrained and confined [her] for a three-month period in several locations across the country and locked her in the house." *Id.* at 12a-13a.

5. The court of appeals affirmed. Pet. App. 1a-6a. Quoting this Court's decision in *United States* v. *Frady*, 456 U.S. 152 (1982), the court noted that in order to show entitlement to relief under 18 U.S.C.

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[1] The district court's instructions with regard to involuntary servitude are set out in full at Pet. App. 19a-21a.

2255, the defendant "must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage." Pet. App. 4a. "All of the evidence at [petitioner's] trial," the court stated, "was designed to demonstrate that she engaged in physical or legal coercion to keep the victims in her service." *Id.* at 3a. "Therefore, regardless of the instruction concerning the relevance of what the victims believed, the jury could not have convicted [petitioner] unless it concluded that she had engaged in 'compulsion of services by the use or threatened use of physical or legal coercion,' as required by *Kozminski*." *Id.* at 3a-4a, quoting 487 U.S. at 953.[2]

## ARGUMENT

Petitioner contends that her convictions on the involuntary servitude and conspiracy counts should be overturned because the instructions "allowed the [jury] to find criminal culpability by means not provided by law." Pet. 19.

Because this is a collateral attack on a conviction, petitioner cannot prevail on the basis of a trial error that was neither objected to nor pursued on appeal unless she can show both "cause" excusing the double procedural default and "actual prejudice" resulting from the alleged errors. *United States* v. *Frady*, 456 U.S. 152, 167-168 (1982); see also *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). In order to establish

[2] The court of appeals also rejected two other contentions going to the validity of petitioner's convictions for escaping and for transporting illegal aliens as well as to the validity of her convictions for holding the girls in involuntary servitude and conspiring to do so. Petitioner has not raised either of those contentions in her petition for a writ of certiorari.

"actual prejudice" sufficient to justify relief under 28 U.S.C. 2255, petitioner must show "not merely that the errors at [her] trial created the *possibility* of prejudice, but that they worked to [her] *actual* and substantial disadvantage, infecting [her] entire trial with error of constitutional dimensions." *United States* v. *Frady*, 456 U.S. at 170. Collateral relief is unavailable where the claimed error is neither "a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure." *Hill* v. *United States*, 368 U.S. 424, 428 (1962).

A miscarriage of justice occurs when a defendant is punished for an act the law does not make criminal. *Davis* v. *United States*, 417 U.S. 333, 346 (1974); *Belt* v. *United States*, 868 F.2d 1208, 1211 n.2 (11th Cir. 1989). It does not follow, however, that a conviction must be overturned if the district court did not instruct the jury in precise conformity with the language of a subsequent decision.

No miscarriage of justice occurred in this case. Although the district court did not instruct the jury at petitioner's trial that "compulsion of services by the use or threatened use of physical or legal coercion is a necessary incident of a condition of involuntary servitude," as would now be required under *Kozminski*, 487 U.S. at 953, the district court correctly concluded in this collateral proceeding that the jury convicted petitioner only on counts for which the evidence supported a finding of "repeated and persistent use of physical and legal coercion against the victims," and that the convictions therefore "rested upon a permissible foundation under the authority of *Kozminski*." Pet. App. 13a. The court of appeals re-

affirmed that conclusion, noting that all of the evidence of compulsion presented at petitioner's trial went toward demonstrating either physical or legal coercion, as those terms are defined in *Kozminski*. *Id.* at 3a.

As the courts below emphasized, the evidence against petitioner established numerous acts and threats of physical abuse, threats of arrest or deportation, and physical restraint of the victims behind locked and guarded fences. In fact, the factual pattern established by the evidence at petitioner's trial was similar to the *Kozminski* Court's description of the conduct prohibited by the Padrone statute, a precursor of 18 U.S.C. 1584—conduct that this Court clearly regarded as a form of physical coercion. See 487 U.S. at 947-948.[3] The evidence showed that the victims were young Hispanic girls, poorly educated and unsophisticated, who were newly arrived in the United States and who were in this country illegally,

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[3] The "padrones" were men who took young Italian boys away from their families, brought them to American cities, and put them to work as street musicians or beggars. As the Court explained:

> These young children were literally stranded in large, hostile cities in a foreign country. They were given no education or other assistance toward self-sufficiency. Without such assistance, without family, and without other sources of support, these children had no actual means of escaping the padrones' service; *they had no choice but to work for their masters or risk physical harm.* The padrones took advantage of the special vulnerabilities of their victims, placing them in situations where *they were physically unable to leave.*

487 U.S. at 947-948 (emphasis added). The Court also indicated that "threatening * * * an immigrant with deportation could constitute the threat of legal coercion that induced involuntary servitude." *Id.* at 948.

and who spoke no English. The evidence further showed that petitioner deliberately recruited girls fitting that description because of their vulnerability, and that she heightened their vulnerability by bringing them to a strange city where they knew nobody, taking away their money and identification papers, and severing all contact with their families. Thus, petitioner placed the victims in a situation where—like the young boys working for the padrones—they were "physically unable to leave." *Id.* at 948.

Nor is petitioner entitled to collateral relief because the instructions provided that the jury should consider whether "the defendant used means of compulsion sufficient in kind and degree to subjugate the will of an ordinary person having the same general station in life and background and experience as that of the alleged victims and to cause the alleged victims to believe that they had no reasonable means of escape and no choice except to remain in the service of" petitioner and her husband. Pet. App. 11a. In *Kozminski* the Court made clear that:

> Our holding does not imply that evidence of other means of coercion, or of poor working conditions, or of the victim's special vulnerabilities is irrelevant in a prosecution under [18 U.S.C. 1584]. * * * [*T*]*he vulnerabilities of the victim are relevant in determining whether the physical or legal coercion or threats thereof could plausibly have compelled the victim to serve.* In addition, a trial court could properly find that evidence of other means of coercion or of extremely poor working conditions is relevant to corroborate disputed evidence regarding the use or threatened use of physical or legal coercion, the defendant's intention in using such means, or the causal effect of such conduct. We hold only

> that the jury must be instructed that compulsion of services by the use or threatened use of physical or legal coercion is a necessary incident of a condition of involuntary servitude.

487 U.S. at 952-953 (emphasis added). Thus, it was entirely proper for the jury to consider the vulnerability of the girls petitioner recruited, together with petitioner's physical abuse of the girls and her threats of legal coercion.[4]

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[4] Petitioner contends that this Court should review the court of appeals' decision because it erroneously "pigeonhol[ed] *Kozminski*'s rationale, reach, and reasoning to exclude only those cases under 18 U.S.C. § 1584 for psychological coercion of the type of which cults—undefined by the Ninth Circuit—are often accused or associated." Pet. 12. That is not an accurate characterization of court of appeals' decision. The court of appeals recognized that, under *Kozminski*, any form of "psychological coercion is not sufficient to bring a defendant's conduct with the purview of the statute forbidding involuntary servitude * * *[;] the defendant must be guilty of bringing physical or legal coercion to bear on the victim." Pet. App. 3a. When read in context, see *id.* at 2a-4a, it is clear that the court's reference to "psychological coercion of the type of which cults are often accused," *id.* at 4a, was not intended to limit *Kozminski*'s applicability to cases involving cults, but simply to provide an example of the kind of prosecution that would not be permissible under *Kozminski*.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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